

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

March 5, 2002

Case # 02.012, *Parent v. SAD #35*

REPRESENTING THE FAMILY : The family was pro se.

REPRESENTING THE SCHOOL: Amy Tchao, Esq.

HEARING OFFICER: Lynne A. Williams, J.D., Ph.D.

This hearing was held and the decision written pursuant to Title 20-A, MRSA, 7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations.

The hearing was requested by the student's mother on January 10, 2002. The case involves the student, whose date of birth is xx/xx/xxxx. He resides with his mother in S. Berwick, Maine. The student is currently a xx year old student, who attended 10th grade at Marshwood High School from September 2001 until a disciplinary removal on October 17, 2001. When the student transferred to Marshwood from a New Hampshire school district, he initially received services under his out-of-state IEP. On October 4, 2001, SAD #35 developed a new IEP for the student.

The student has not returned to school since the October incident. He was placed at the Youth Center from the time of the incident until December 18, 2001. The student is eligible for special education services under the category of Emotional Disability and is currently receiving tutoring from the school department under his most recent IEP, developed on January 24, 2002.

The mother contends that the student's October 4, 2001 IEP was not reasonably calculated to provide the student with an appropriate education, and that the PET team committed procedural violations in the development of that IEP. She further contends that the student's behavior on October 17, 2001, was a manifestation of his disability, contrary to the manifestation determination reached on October 26, 2001.

The parties held a prehearing conference on February 4, 2002, to clarify the issues for hearing. Documents and witness lists were exchanged in a timely manner. The family entered 21 pages of documents. The school department entered 108 pages of documents. The hearing was held on February 12, 2002, at the Department of Human Services, Sanford, Maine. Ten witnesses testified. Both parties submitted closing, written arguments and the record closed on February 20, 2002.

Following is the decision in this matter.

I. Preliminary Statement

This case involves a xx-year-old male student, who is eligible for special education services under the category of Emotional Disability. Student transferred into tenth grade at Marshwood High School, in MSAD #35, at the beginning of the 2001-2002 school year. He had previously received accommodations and modifications under a New Hampshire IEP, and MSAD #35 implemented this IEP at the beginning of this school year. On October 4, 2001, a PET meeting was held, and a new IEP was developed. This IEP retained some of the same modifications and accommodations and added one period a day of academic strategies.

On October 17, 2002, student brought a weapon and ammunition to school, and concealed them outdoors on the school grounds. After the Principal of Marshwood High School was informed about the weapon on school grounds, student was taken to the Vice- Principal's office, questioned by the police, and ultimately placed at the Youth Center. The gun was found that same day. A manifestation determination meeting was held on October 26, 2001, and concluded that student's behavior was not a manifestation of his disability.

Student remained in the Youth Center until December 18, 2001. On that date, he was released under an Order of Conditional Release. He is currently receiving ten hours a week tutoring at home, under an IEP developed on January 24, 2002.

The family requested this hearing. They contend that the manifestation determination was defective, both procedurally and substantively. The family also contends that student's October 4, 2001 IEP was procedurally and substantively defective.

The School Department denies these contentions.

II. Prehearing Motions and Documentary Issues

At the prehearing, the school department submitted a motion requesting this hearing officer to either order the family to submit an unredacted copy of a December 5, 2001 Preadjudicatory Evaluation of student, conducted by Dr. Kirsten Milliken, or to exclude the entire report from being entered into evidence. After an in camera inspection of the entire report, this hearing officer ordered the family to submit two additional sections of the report into evidence. The family complied with this order. Ms. Tchao's objection to my ruling was made on the record.

In a February 6, 2001 letter, Ms. Tchao informed Dr. Milliken that she was to be subpoenaed to appear at the hearing and to bring with her copies of the protocols used for the evaluations conducted by her on November 16, 2001. Dr. Milliken agreed to testify by telephonic conference call, but declined to submit the test protocols due to FERPA (Family Education Records Protection Act) concerns. In the end, however, Dr. Milliken was not called to testify.

Prior to the start of the hearing, Ms. Tchao requested that I accept into evidence a set of documents forwarded to her by the South Berwick Police Department. I reserved judgment until hearing the testimony of Officer Dennis Gaffney of the South Berwick Police Department. After hearing the officer's testimony, I declined to enter the proffered documents into evidence, finding them redundant.

III. Issues to Be Decided by the Hearing

- **Did the PET meet the legal mandates of the Individuals with Disabilities Education Act (IDEA), both procedurally and substantively, in its development of student's October 4, 2001 IEP? Was that IEP reasonably calculated to provide student with a free, appropriate, public education?**
- **Was student's behavior on October 17, 2001, a manifestation of his disability or was the PET correct in concluding that the behavior was not a manifestation of his disability?**

IV. Stipulations

Both parties stipulated that student's current alternative educational placement is appropriate, that student's current IEP is appropriate and that regardless of the outcome of this hearing, student will continue in an alternative educational placement for an additional period of 45 days.

IV. Findings of Fact

1. Student's date of birth is xx/xx/xxxx. (Exhibit: S23)
2. In June 1999, Pierre Schmidt, M.A., conducted an evaluation of student, while student was attending middle school in New Hampshire. On the WISC-III, student's scores were as follows: Verbal IQ, 114; Performance IQ, 110; Full Scale IQ, 113. (Exhibit: S66, P11)
3. On June 23, 2000, John M. Shimer, D.Min., conducted an intake evaluation of student, due to the mother's concern about student's behavior, particularly in the home. Following initial intake, Dr. Shimer began seeing student in a therapeutic situation. (Exhibit: P5; Testimony: Mother)
4. During the fall of 2000, student exhibited increasingly violent behavior at home and also an increase in school disruptions. In October 2000, student ran away from home and began staying with friends. He was subsequently placed at Midway Shelter in New Hampshire, where he seems to have remained at least up until the end of October 2000. When student entered Midway, an Individualized Services/Treatment Plan was developed for him. The goals included improving pro-social coping and communication skills and improving his anger redirection skills. (Exhibit: P3)

5. On October 31, 2000, student began psychiatric care at the North Essex Mental Health Center in Newburyport. At this time, student agreed to try medication. Dr. Shimer notes that when student began taking the medication, there was a “rapid and dramatic change in his presentation.” Student was able to come home, notes Dr. Shimer, but after a time he began having “unwanted side effects from the medication and stopped taking them.” His condition subsequently deteriorated. (Exhibits: P4, P5; Testimony: Mother)
6. In November 2000, a psychoeducational evaluation of student was conducted by the Sanborn (NH) Regional School District, following a referral by his mother, due to concerns about poor academic progress, poor motivation and difficulty with anger control. Gail Sudduth, CAGS, administered the Behavioral Assessment System for Children (BASC) and reviewed the June 1999 WISC-III findings of Dr. Schmidt. The BASC scales were completed by student, mother and a teacher. The results of all three reports indicated a number of clinically significant areas, the self-report showing the most clinically significant areas. The teacher report showed Conduct Problems as clinically significant, as does the parent report. The parent report also shows Atypicality and Attention Problems as clinically significant, as does the self-report, which also includes Attitude to School, Attitude to Teachers, Sensation Seeking, Somatization and Relations with Parents as clinically significant. Each report also showed one or more at-risk categories. At the close of her report, Ms. Sudduth recommends that “confirmation from the diagnosing physician should be sought to support a possible identification due to an emotional handicap.” (Exhibit: P2)
7. On January 9, 2001, Bette Lanzillo administered the Kaufman Test of Education Achievement (KTEA). Student scored in the high or above average ranges in all academic areas, except for spelling, in which he received an average score. (Exhibit: P1)
8. On January 9, 2001, student was determined to be eligible for special educational services by the Sanborn (NH) Regional School District, under the category of Emotionally Handicapped. The IEP developed at this time was not submitted by either party as part of the documents submitted for his hearing. However, subsequent documents from MSAD #35 indicate that student received modifications and accommodations in his New Hampshire IEP, but no direct academic services. Student attended school in New Hampshire through the 2000-2001 school year. (Exhibit: S64; Testimony: Mother, C. Smith)
9. In a letter dated February 13, 2001, Dr. Stephen J. Wieder, who had been seeing student professionally, stated that student had been diagnosed with Depressive Disorder, Not Otherwise Specified, and had been prescribed Zoloft as an antidepressant. (Exhibit: P4)
10. In August 2001, after moving with his mother to Maine, student transferred into Marshwood High School, in SAD #35. (Testimony: Mother, C. Smith)

11. On the weekend prior to the opening of the 2001-2002 school year, student engaged in an argument, involving some physical contact, with another student, while both students were attending a school dance. The Principal was able to diffuse the situation. As a result of this incident, the school guidance counselor contacted student's former school district and inquired about student's disciplinary history. He was told that student had not been a behavior problem at his prior school. (Testimony: T. Ward)
12. Student began classes at Marshwood on September 4, 2001, and received accommodations and modifications under his prior New Hampshire IEP. Although he felt "accepted" at his new school, student did have some difficulties with some of the other students. Student also admitted that he did not care about the school rules and that he felt there would be no consequences for breaking those rules. (Testimony: Student)
13. On September 26, 2001, student was discovered on a school computer, reading material on a web site involved with terrorism and bomb making. The teacher reported this incident to the principal, who had a discussion with student about this behavior. Following this incident, student was suspended for five days. (Exhibits: S35, S 59; Testimony: T. Ward)
14. During the period between September 12, 2001 and October 16, 2001, student received nine disciplinary referrals. However, with the exception of the five-day suspension on September 26, 2001, all of the incidents were relatively minor, such as "skipping detention, cutting classes and disruption." (Exhibit: S35)
15. On October 4, 2001, a PET meeting was held to develop a new IEP for student. At this meeting, the mother requested that a current psychological evaluation be completed, due to student's poor academic progress, poor motivation and difficulty with anger control. The determinations of the PET, however, do not indicate that this evaluation was ordered, although student was to be scheduled for a vocational assessment. The October 4, 2001 IEP continued two modifications that student was seen as needing - preferential seating and permission to leave the classroom if necessary to do emotional processing. Two modifications from the previous IEP were no longer considered necessary - extended test time and test taking in a separate room. Academic Strategies, for 210 minutes per week, designed to focus on work completion, was added. Student's prior IEP did not include academic support. Student's goals in the new IEP were in the areas of work completion and passing grades. A transition plan was also developed and appended to the IEP. Ms. Gould, the Special Education Teacher, recalls the meeting as being cordial and permitting frank discussion of student's needs. The mother recalls feeling positive and optimistic after leaving the meeting. (Exhibits: S48-55; Testimony: Mother, J. Gould, C. Smith)

16. On the evening of October 16, 2001, while student was out with some of his friends, the group encountered another group of students from Marshwood High School. Following the exchange of some negative comments, student exhibited a gun he had in his possession and fired a shot at the ground near the other group of students. Student and his friends then returned home. None of the students present at this incident reported what had occurred either to their parents or to the police. However, student did tell at least two other students what he had done, suggesting that he knew it was wrong, and he wondered if he would be caught. (Exhibit: S94; Testimony: Student, D. Berube, D. Gaffney)
17. The next day, October 17, 2001, student brought the same gun with him on the school bus. He informed at least one of his friends that he had the gun in his possession and that friend discouraged student from taking the gun into the school building. Student then hid the gun under a tarp on the school playing field. (Exhibit: S993-95; Testimony: Student, D. Gaffney)
18. Soon after school began on the morning of October 17, 2001, Dr. Ward, Principal of Marshwood High School, was informed by a few students that Student had brought a gun to school and hidden it on school property. The Police Department and student's mother were called and student was taken to Vice Principal Mehlhorn's office. Mr. Mehlhorn encouraged student to reveal the whereabouts of the gun, but student refused to do so. The gun was subsequently located. (Exhibits: S71-72; Testimony: P. Mehlhorn, T. Ward)
19. When the police officers and student's mother arrived, student was questioned about the weapon. Student was calm and cooperative throughout the interview, but did not admit anything at this time. After determining that there was probably [sic] cause to charge student, he was taken to the police station, and eventually to the Youth Center. (Exhibit: 71-72; Testimony: D. Gaffney)
20. During his testimony at the hearing, student admitted that taking the gun to school was a stupid thing to do, but said he did not think he would get into trouble because he was "not thinking," and his "brain was racing." (Testimony: Student)
21. Following the October 17, 2001 incident, student was suspended from school for ten days. (Exhibit: S33)
22. On October 22, 2001, student's PET met to conduct a manifestation determination. Because of an initial reluctance on the part of two of the regular education teachers to make a decision about the relationship between student's disability and his behavior, the principal agreed to adjourn the meeting until October 26, 2001, and invite a psychologist to join them at that meeting. On October 26, 2001, the meeting was reconvened, with the presence of Dr. Laura Goldberg, a neuropsychologist. Dr. Goldberg had previously reviewed student's records and the various reports in student's files. Dr. Goldberg never met, nor interviewed, student. She presented her analysis of student's record and evaluations and expressed her opinion that he

understood and could control his behavior.¹ The mother described some of student's past behaviors and his need to take medication to manage his moods and behaviors. He had not taken his medication on the day before or the day of the incident. At least one of the regular education teachers continued to express reluctance to make a judgment regarding student's behavior, and the minutes state that "the majority of the PET members agree that [student's] action of bringing the gun and ammunition to school for the purpose of hiding it is not a manifestation of his handicapping condition." (Exhibits: S36-42; Testimony: Mother, Student, T. Ward, C. Smith)

23. On November 13, 2001, the mother was informed of the MSAD #35 Board of Directors' intent to hold a hearing to determine whether to expel student from Marshwood High School, such hearing to be held upon student's release from the Youth Center. (Exhibits: S30-32)
24. On November 16, 2001, a Preadjudicatory Evaluation of student was done by Dr. Kirsten W. Milliken. Dr. Milliken reviewed previous reports and testing results and administered the Rorschach Inkblot Test, the WISC-III and the Minnesota Multiphasic Personality Inventory for Adolescents (MMPI-A). Student's WISC-III scores were Verbal IQ, 106, Performance IQ, 107, and Full Scale IQ, 107, consistent with his results on the test administered by Dr. Schmidt in 1999. Student's Rorschach results suggested to Dr. Milliken that student does have some issues with reality testing, with "severe impairment [of reality testing] when faced with moderate levels of stress." She further states that he "may fail to anticipate the consequence of his actions, and misconstrue the boundaries of appropriate behavior," "is prone to periods of depression," and has oppositional tendencies. Student's MMPI-A results suggest problems with emotional processing, and the use of "denial and rationalization to avert blame and responsibility for his behavior." In her section on "Diagnostic Impressions," Dr. Milliken states that bipolar disorder cannot be ruled out. (Exhibit: P10)
25. On December 18, 2001, student was released from the Youth Center under an Order of Conditional Release. The order, among other things, directs student to reside with his mother, to have no contact with certain students and to remain under house arrest for the near future. Student is not permitted to be out of the presence of either his mother, his maternal grandmother or either of two maternal uncles. Furthermore, he must comply with a Proposal for Release, a document developed by student's mother, which includes possible services for anger management, possible residential or day treatment and outpatient therapy to deal with diagnostic and medication issues. (Exhibit: P12; Testimony: Mother)
26. On January 10, 2001, the mother filed a Dispute Resolution Request Form with the Due Process Office of the Department of Education. (Exhibit: S23-28)

¹ Dr. Scott Hoch, who testified at the hearing, expressed conclusions similar to those of Dr. Goldberg, but like Dr. Goldberg, Dr. Hoch never met or interviewed student.

27. Student's PET met on January 24, 2002, to develop an Interim IEP for student. All appropriate personnel were present at that meeting, including an administrator, the mother, the guidance counselor, the special education teacher, student's tutor and the four relevant regular education teachers. The alternative educational placement was determined to be home tutoring, ten hours per week. Student will also have counseling one hour per week to address school related issues. A neuropsychological examination was ordered and a functional behavioral assessment was ordered. Student's long term goals included obtaining passing grades and participating in counseling, with short term objectives addressing assignment completion and improvement of coping skills within the school setting. A revised transition plan was developed, with the counseling services added, and a detailed Behavior Management and Support Plan was developed. This plan addresses as target behaviors work completion and anxiety related to work completion, and include numerous interventions and support strategies for use by the tutor and by the student. (Exhibits: S5-17)
28. On January 24, 2002, student's expulsion hearing, previously scheduled for November 2001, and then for January 28, 2002, was postponed, pending issuance of a decision in this hearing. (Exhibit: S18)
29. On January 31, 2002, Steven Chabot, student's tutor, submitted a detailed summary and log of the tutoring sessions with student. Student is being tutored ten hours per week, in Geometry, Biology, Sociology and English II and is doing very well in his classes. (Exhibit: S2-5; Testimony: C. Smith)

V. Conclusions

Did the PET meet the legal mandates of the Individuals with Disabilities Education Act, both procedurally and substantively, in its development of student's October 4, 2001 IEP? Was that IEP reasonably calculated to provide student with a free, appropriate, public education?

The Supreme Court has instructed us that the first question to be addressed when considering the appropriateness of an IEP, and consequently the placement and program offered to a student, is whether the school has "complied with the procedures set forth in the Act," *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982). Additionally, if the procedures are shown to be inadequate, it must also be shown that those violations "compromised the student's right to an appropriate education, seriously hampered the parent's opportunity to participate in the formulation process or caused a deprivation of educational benefits." *Roland M.*, 910 F.2d 983, 994 (1st Cir. 1990). Furthermore, it is incumbent upon the family, not the school district, to produce evidence sufficient to support its allegation of procedural violations sufficient to show an IDEA violation. *Roland M.*, 910 F.2d at 995. See also *M.S.A.D. No. 72*, Case No. 00.220 (Williams, L, October 24, 2000) (school district's motion for judgment as a matter of law granted because family failed to meet its evidentiary burden to show by a preponderance of the

evidence that the school failed to provide FAPE); *Lewiston School Department*, Case No. 01.139 (Williams, L., June 20, 2001) (case dismissed because family failed to meet its evidentiary burden to show by a preponderance of the evidence that student's alternative placement was inappropriate).

The mother failed to produce evidence sufficient to show that the PET committed any procedural violations. Proper meeting notice was given and all appropriate parties were present at the October 4, 2001 PET meeting. Although the family alleges that the Vice Principal failed to give proper consideration to whether student was still in need of the modifications and accommodations included on his New Hampshire IEP, there is no factual evidence to support this allegation. Although two modifications were deleted from student's IEP, no PET member, parent included, argued that these modifications continued to be necessary. In addition, the PET added one period a day of academic support, an educational service not included in student's New Hampshire IEP.

The mother participated fully in the discussion of the PET, and gave no indication at that time that she was dissatisfied with the PET deliberations or determinations. Other members of the PET testified that the meeting was cordial and positive, with open discussion of student's need. The mother herself was encouraged and positive after the meeting.

Given the information provided to this hearing officer, the family has failed to provide evidence sufficient to show any procedural violations of the IDEA on the part of SAD #35.

The family further alleges that the IEP developed at the October 4, 2001 PET meeting was substantively deficient, and not reasonably calculated to provide student with an appropriate education. However, the family has failed to provide any evidence that the IEP was deficient, considering the information available to the school district at that time. Perhaps there were aspects of student's emotional or behavioral needs that theoretically should have been included in an IEP; however, as the First Circuit has said, an IEP must be judged based on what information was available to the school district at the time the IEP was developed. *Roland M.*, 910 F.2d at 992. If student had emotional or behavioral needs that were not conveyed to the school district prior to October 4, 2001, the district would have been unable to incorporate those needs into the IEP that it was developing.

Student is a very intelligent young man, and there is no evidence that he suffers from a learning disability. Rather, his major needs center around work completion. The IEP that the team developed included a daily period of academic strategies, designed to assist student in addressing these issues, as well as seating modifications designed to provide increased teacher support for student. In addition, the modification that permitted student to leave class in order to process emotional reaction recognized student's emotional needs, and attempted to provide a positive outlet for any anxiety or frustration he might be feeling. The IEP developed by the PET on October 4, 2001 was reasonably calculated to provide student with educational benefit through the provision of academic strategies and emotional support.

- **Was student's behavior on October 17, 2001, a manifestation of his disability or was the PET correct in concluding that the behavior was not a manifestation of his disability?**

Federal law and regulations, as well as state regulations require that a PET, after considering evaluations, observations and other diagnostic information regarding the student, determine that:

- (1) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;
- (2) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action;
- (3) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

20 USC §1415(k)(4), MSER §14.6(c)(2)

If any of these standards are not met, the PET must find that student's behavior was a manifestation of his disability. 34 C.F.R. §300.523(f).

As discussed above, student's IEP was substantively appropriate in relation to any behavior he might reasonably be expected to engage in. Although student had some disciplinary referrals prior to the October 17, 2001 incident, those referrals were all considered infractions, resulting in detentions. Only one, the incident of student logging onto a bomb making web site at school, would be considered a serious incident, resulting, as it did, in a suspension. The conduct at issue in this hearing, a weapons violation, is far more serious than online improprieties, and there is no evidence to suggest that the school district should have been aware that student was at risk for behavior this serious, nor that the risk of such behavior should be addressed in student's IEP. Rather, when the Marshwood High School guidance counselor contacted student's previous school district to inquire about student's disciplinary history, she was informed that student had not had behavioral issues at his former school.

Student's IEP was developed on October 4, 2001, less than two weeks prior to the incident at issue in this hearing. Perhaps as time went by, student would have exhibited increasingly serious behavioral issues. In that case, the PET would have been expected to meet and reconsider the appropriateness of student's IEP. However, given the nature of student's behavior between his entrance into Marshwood High School and the incident of October 17, 2001, there is no evidence to indicate that student's IEP was inappropriate.

Likewise, there was no evidence submitted at hearing that student's IEP was not being fully implemented. There were some suggestions at the hearing that student was being harassed by other students, although student himself never confirmed this harassment or teasing. Neither Dr. Ward nor Mr. Mehlhorn testified that they had received any reports of harassment or teasing. Again, in the absence of any information that would suggest that student's IEP was either inappropriate or not being fully implemented, the school cannot be found to have committed IDEA violations.

The real key to identifying whether a student's behavior was a manifestation of his disability is to understand whether student was able to understand the impact and consequences of his behavior and whether he was able to control his behavior. 20 USC §1415(k)(4)

Understanding and control are abstract concepts, and as legions of judges in criminal cases involving insanity defenses have found, the questions involving these concepts defy easy answer. However, these are the questions presented by the IDEA, and any manifestation determination must answer them.

Student is an intelligent young man, as his WISC-III and academic achievement scores have shown. As he stated to his friend on the evening before bringing the gun to school, but after he had already shot the gun in the vicinity of other Marshwood students, he seemed to know what he had done was wrong, but didn't know if he'd be caught. The next morning, he allowed himself to be discouraged from bringing the gun into the school building, and knew that his locker would be searched. He refused to disclose the location of the gun to school authorities or the police officer.

There is simply no credible evidence to support the contention that student did not know or anticipate the consequences of his behavior. Rather, the fact that he brought the gun to school following the incident of the previous evening is suggestive of willful planning. The facts of the October 17, 2001 incident suggest not only that student understood the consequences of his behavior, but that he was able to control that behavior. There is no indication in the documents or testimony that student suffers from an impulsivity disorder. Although student may, or may not, actually suffer from bipolar disorder, no evidence was submitted that would support the contention that bipolar disorder, in and of itself, makes one unable to control one's behavior. Therefore, even if student arguably suffers from bipolar disorder, that fact alone is insufficient to support the contention that student was unable to control his behavior on October 17, 2001.

A series of events involving a number of individual decisions – bring the gun to school, don't take the gun into the building, find a very good hiding place on campus, refuse to reveal the location of the gun when confronted – are much more suggestive of a deliberative process than of an impulsive process. As the Maine District Court concluded in *Parents v. M.S.A.D.* No 59, 165 F. Supp.2d 37, 35 IDELR 189 (D. ME. Oct. 10, 2001), a student's actions that involve many individual decisions, over a period of time, do not constitute impulsive decision-making. The District Court in *Parents* rejected the argument that a bad decision is not by definition an impulsive decision. See also

Valparaiso Comm. Sch., 30 IDELR 1033 (SEA IN. 1999) (the degree of planning and covertness involved in a fire-setting incident demonstrated the behavior was not impulsive, even though student had a history of impulsive behaviors) and *Oconee County Sch. Sys.*, 27 IDELR 629 (SEA GA. 1997) (student considered the consequences of his actions on several occasions and was not merely exhibiting impulsivity connected to his ADHD).

The mother infers that student was released from the Youth Center into her custody because the correctional system recognized that this case was a mental illness case rather than a detention case. However, it is just as likely that student was released because the court recognized that student is fortunate enough to have a loving, involved, resourceful parent, who can very effectively assist student in receiving the professional services that he needs.

A final argument put forth by the family is that the manifestation determination was procedurally flawed. The family argues that there was uneasiness on the part of two regular education teachers to make a decision on whether student's behavior was a manifestation of his disability, and that polling, rather than the development of consensus, was used in the course of the manifestation hearing. It is true that two regular education teachers did express reluctance to express an opinion regarding whether student's behavior was a manifestation of his disability. In light of this, however, the PET meeting was continued, and testimony from a psychologist who had reviewed student's records was presented at the next manifestation meeting. At this second meeting, without reaching consensus, the team did agree that student's behavior on October 17, 2001, was not a manifestation of his disability.

The suggestion that polling was used at the manifestation meeting is in no way indicative of a procedural violation. During the course of a meeting, it is only natural that the facilitator might "poll" participants about their opinions, and this is permissible under MSER §8.11. However, the fact of the matter is that, notwithstanding the family's disagreement, the PET was legally required to come to a decision, which it did.

VI. Decision

Student's October 4, 2001, IEP was reasonably calculated to provide student with educational benefit and the school department committed no procedural violations in the development of this IEP.

Student's behavior on October 17, 2001 was not a manifestation of his disability and the school department committed no procedural violations in the conduct of the manifestation determination meeting.

VII. Order

Since MSAD #35 committed no substantive or procedural violations of the IDEA, no order is issued.

Lynne A. Williams, J.D., Ph.D.
Hearing Officer

Date

Family's Index of Documents

- P1 Academic Evaluation, Sanborn Regional High School, dated January 9, 2001 (2 pages)
- P2 Psychoeducational Evaluation, Sanborn Regional High School, dated December 18, 2000 (3 pages)
- P3 Individual Service/Treatment Plan, dated October 22, 2000 (2 pages)
- P4 Letter from Dr. Stephen J. Wieder, M.D., regarding student, dated February 13, 2001 (one page)
- P5 Letter to the mother from John N. Shimer, D. Min., regarding the student, dated October 22, 2001 (2 pages)
- P6 through P9 were documents, previously submitted by the School District, and did not need to be resubmitted by the Family.
- P10 Preadjudicatory Evaluation, conducted by Kirsten W. Milliken, Ph.D., partial report, dated December 5, 2001 (6 pages)
- P11 KTEA and WISC-III Scoring Sheets, dated June 24, 1999 (2 pages)
- P12 Order of Conditional Release, dated December 18, 2001 (3 pages)

Family's Witness List

Student

Mother

Family friend

Friend of student

School Department's Index of Documents

- S1 Letter from Dr. Ward to the mother, dated January 31, 2002
- S2-4 Summary of tutoring session, dated January 12, to January 30, 2002
- S5-8 PET Minutes, dated January 24, 2002
- S9-17 Interim IEP, dated January 24, 2002
- S18 Letter from the mother to Superintendent Jensen, dated January 24, 2002
- S19-20 Letter from Superintendent Jensen to the mother, dated January 17, 2002
- S21-22 Letter from Superintendent Jensen to the mother, dated January 14, 2002
- S23-27 Mother's Expedited Hearing Request Form, dated January 10, 2002
- S28 Letter from the mother to Dr. Ward, dated January 10, 2002
- S29 Detained Youth School Program Interim Educational Services Report, dated January 6, 2002
- S30-31 Letter from Superintendent Jensen to mother, dated November 13, 2001
- S32-34 Letter from Dr. Ward to Superintendent Jensen, including attached Discipline Referral Form and Weapons Policy, dated November 6, 2001
- S35 Student Discipline Record Listing, dated October 31, 2001
- S36-38 PET Minutes, dated October 26, 2001
- S39-40 Manifestation Determination PET Meeting Notes, dated October, 2001
- S41-45 PET Minutes, dated October 22, 2001
- S46 Detained Youth School Program Release of Information Form, dated October 18, 2001
- S47 Discipline Referral Form, dated October 17, 2001
- S48-51 PET Minutes, dated October 4, 2001
- S52-56 IEP, dated October 4, 2001
- S57 Parental Notice Form, dated October 4, 2001
- S58 Discipline Referral Form, dated September 26, 2001

- S59 Memo from Jo Osgood to Principal Ward and Assistant Principal Mehlhorn, regarding September 26, 2001 incident
- S60 Discipline Referral Form, dated September 19, 2001
- S61 Letter from Dr. Wieder, dated February 13, 2001
- S62-65 Academic Evaluation, dated January 9, 2001
- S66-68 Psychoeducational Evaluation Report by Gail Sudduth, dated December 18, 2000
- S69-105 South Berwick Policy Department Incident Report and Supplemental Reports regarding October 16-17, 2001 incidents
- S106-107 Attendance Report, 2001-2002 school year, dated February 1, 2002
- S108 Grades/Progress Report, dated February 1, 2002

School Department's Witnesses

Dr. Tom Ward, Principal, Marshwood High School

Paul Mehlhorn, Assistant Principal, Marshwood High School

Carole Smith, Director of Special Education

Dr. Scott Hoch, Licensed Psychologist

Officer Dennis Gaffney, South Berwick Police Department

Janet Gould, Special Education Teacher